KIRBA DAISY JOHN DAS v. CITY-LINK EXPRESS (M) SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
ABANG ISKANDAR JCA
ABDUL RAHMAN SEBLI JCA
[APPEAL NO: W-01(A)-13-01-2018]
11 JULY 2019

LABOUR LAW: *Employment – Constructive dismissal – Demotion – Applicant demoted due to allegations of scuffle with subordinate – Whether applicant conducted herself in unruly and disrespectful manner – Whether applicant proved to be victim of assault – Subordinate made defamatory remarks against applicant – Applicant took legal action against subordinate in his personal capacity – Whether valid exercise of applicant's private right – Whether charges against applicant established – Whether company had valid reasons to demote applicant – Whether applicant justified in treating herself as being constructively dismissed*

LABOUR LAW: *Industrial Court – Award – Whether order of certiorari ought to be issued to quash award – Employment – Constructive dismissal – Demotion – Applicant demoted due to allegations of scuffle with subordinate – Whether applicant conducted herself in unruly and disrespectful manner – Whether applicant proved to be victim of assault – Subordinate made defamatory remarks against applicant – Applicant took legal action against subordinate in his personal capacity – Whether valid exercise of applicant's private right – Whether charges against applicant established – Whether company had valid reasons to demote applicant – Whether applicant justified in treating herself as being constructively dismissed – Whether award handed down ought to be set aside*

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Award from Industrial Court – Whether ought to be quashed – Employment – Constructive dismissal – Demotion – Applicant demoted due to allegations of scuffle with subordinate – Whether applicant conducted herself in unruly and disrespectful manner – Whether applicant proved to be victim of assault – Subordinate made defamatory remarks against applicant – Applicant took legal action against subordinate in his personal capacity – Whether valid exercise of applicant's private right – Whether charges against applicant established – Whether company had valid reasons to demote applicant – Whether applicant justified in treating herself as being constructively dismissed – Whether award handed down ought to be set aside*

The applicant, who was in the employment of City-Link Express (M) Sdn Bhd ('first respondent'), was asked to head the central region and the logistics department, where the senior logistics manager ('Chong'), was to report to the applicant. The working relations between the applicant and Chong deteriorated and led to an alleged scuffle between them in the corridor outside the applicant's office. As a result, the two of them were suspended and a domestic inquiry was held jointly against both of them on several

charges. Both were found guilty of conducting themselves improperly, unruly and disrespectfully in the discharge of their duties thus showing a bad example of managerial leadership to their subordinates ('first charge'). Both were demoted. The applicant was demoted to senior manager of the investigation and security department. In addition, the applicant was found guilty of issuing a legal letter by her lawyer against Chong on an internal e-mail, which matter was being investigated by the company thus causing unnecessary fear to Chong and was in total disregard to the company's investigation process ('third charge). The applicant appealed against her demotion but the management decided to maintain its decision. The applicant then put the first respondent on notice of its breach of the applicant's contract of employment, giving the first respondent seven days to rectify its breach by reinstating her to her previous position, failing which, she would deem that she had been constructively dismissed. The applicant did not report to the position of senior manager, considered herself to have been constructively dismissed by the first respondent and subsequently filed a representation under s. 20 of the Industrial Relations Act 1967 to the Industrial Relations Department. The representation was referred to the Industrial Court ('second respondent') for adjudication. The second respondent decided that the applicant had failed, on a balance of probabilities, to show that she was constructively dismissed by the first respondent and therefore, there was no constructive dismissal and that the applicant had resigned on her own volition. Dissatisfied by the decision, the applicant filed an application for judicial review in the High Court. The High Court, in dismissing the applicant's application, held that the conduct of the applicant warranted disciplinary action against her and it was within the first respondent's powers to demote her. Thus, the High Court concluded that the first respondent had not acted in breach of a fundamental term of the contract of employment. Hence, the applicant appealed.

Held (allowing appeal with costs)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) The first charge had been concerned with a specific incident, *ie*, the scuffle, a word which would necessarily and ordinarily connote an altercation between two persons, involving an equally active participation by both persons involved. However, from CLW2's evidence, the applicant had been assaulted by Chong who was bent on getting a logbook away from the applicant, who had the right to have sight of its contents as it was connected with alleged improper sale to third parties, of pellets/boxes belonging to the first respondent. The applicant was merely discharging her obligations as a senior official of the first respondent in protecting the latter's properties from being improperly pilfered, *albeit* by its own employees. Clearly, it was a one-way traffic all the way. The fact that the applicant was the victim could not be ignored in the circumstances. The applicant was a victim of an

assault by a subordinate. There was no scuffle and therefore the applicant did not conduct herself in a manner that was unruly and disrespectfully thereby showing bad examples of managerial leadership to subordinates. (paras 24-27)

(2) In the context of the factual circumstances, the courts below were wrong in finding that there was a scuffle between the applicant and Chong, the crucial gravamen in the first charge. Such finding was against the weight of evidence adduced before the second respondent, or otherwise not supported by the revealed facts. The unjustified finding that there was a scuffle led the second respondent to conclude that both parties were at fault and thereby handing an award that it did, which was later affirmed by the High Court at the judicial review application. Surely, the finding of the second respondent was not deserving of deference by the High Court. Such a finding was one susceptible to a review and ought to be disturbed. (para 33)

(3) As regards the third charge, it was not disputed that Chong had called the applicant as a 'trouble instigator and actress.' The applicant had taken umbrage at this and considered such remarks as defamatory and a blemish against her character. In light of such circumstances, it would be reasonable for a person circumstanced as the applicant to take action against Chong, who in the estimation of the applicant, had defamed her. The first respondent did not take action on the complaint lodged by the applicant pertaining to allegations that Chong had made defamatory remarks against her. The applicant was clearly exercising her private rights to vindicate a perceived wrong against her which the first respondent, to her mind, was not able to provide. The applicant had taken legal action against Chong in his personal capacity and the first respondent was never cited or named as a party in the legal action. This was a valid exercise of the applicant's private right against Chong. Obviously, the third charge against the applicant had stood on tenuous ground and had no proverbial legs to stand on. (paras 28 & 34)

(4) The applicant had given notice to the first respondent to the effect that if she was not reinstated to her former position, she would deem herself as having been constructively dismissed. Upon expiry of the period given to reinstate and there being no reinstatement by the first respondent, the applicant walked away from her workplace. There was no delay on the part of the applicant in leaving the first respondent. In light of the fact that the first charge and the third charge were not established, there was no reason whatsoever for the first respondent to demote the applicant from her position. Without those adverse findings against the applicant, there existed no justification for the first respondent to impose the demotion against the applicant. The applicant was thus justified in treating herself as having been constructively

dismissed by the first respondent, in the circumstances. The award by the second respondent had qualified as a perverse decision and it could not be allowed to stand and must therefore be quashed. (paras 36-38)

Case(s) referred to:

Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223 ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Western Excavating (ECC) Ltd v. Sharp [1978] 2 WLR 344 ***(refd)***

Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC ***(refd)***

Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s. 20

For the appellant - Mohan Ramakrishnan; M/s Ramakrishnan & Assocs
For the 1st respondent - P Mithran; M/s Sothi & Ang

[Editor's note: For the High Court judgment, please see Kirba Daisy John Das v. City-Link Express Sdn Bhd & Anor [2018] 1 LNS 775 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Abang Iskandar JCA:

Brief Facts Of The Case

[1] Kirba Daisy a/p John Das, ("the applicant") joined City-Link Express (M) Sdn Bhd ("the first respondent") on 5 February 1990 as a credit control executive. She was subsequently promoted to the position of general manager on 1 January 2001.

[2] During a restructuring exercise on 26 April 2007, the first respondent re-designated the applicant to the position of general manager of operations to support the chief executive officer of the first respondent. A further restructuring exercise was undertaken by the first respondent on 21 January 2008 in relation to the central region and the logistics department. The applicant was asked to head these two departments, where one Mr Steven Chong, the senior logistics manager at the first respondent is to report to the applicant.

[3] The working relations between the applicant and Mr Steven Chong deteriorated and led to an alleged scuffle between them on 15 April 2008 in the corridor outside the applicant's office. As a result of the scuffle, both of them were suspended on 3 June 2008. A domestic inquiry was held jointly against both of them on 5 June 2008 and 6 June 2008 on three charges.

[4] Both were found guilty of conducting themselves improperly, unruly and disrespectfully in the discharge of their duties thus showing a bad example of managerial leadership to their subordinates. That was the subject-matter of the first charge. Both were demoted. The applicant was demoted to senior manager of the investigation and security department while Mr Steven Chong to manager of sea freight division of City Link Sea and Air Services Sdn Bhd. In addition, the applicant was also found guilty of the third charge.

[5] The applicant appealed against her demotion *vide* her letter dated 1 July 2008. The management considered the appeal but decided to maintain its decision.

[6] The applicant then put the first respondent on notice of its breach of the applicant's contract of employment *vide* letter dated 7 July 2008, giving the first respondent seven days to rectify its breach by reinstating her to her previous position, failing which, she would deem that she had been constructively dismissed.

[7] The applicant did not report to the position of senior manager, considered herself to have been constructively dismissed by the first respondent and she had subsequently filed a representation under s. 20 of the Industrial Relations Act 1967 to the Industrial Relations Department.

[8] The representation was referred to the Industrial Court ("the second respondent") for adjudication. On 10 December 2014, the second respondent decided that the applicant has failed, on a balance of probabilities, to show that she was constructively dismissed by the first respondent and therefore, there was no constructive dismissal and that the applicant had resigned on her own volition.

[9] Dissatisfied by the decision, the applicant filed an application for judicial review in the High Court.

Finding Of The High Court

[10] The learned High Court Judge ("HCJ") in dismissing the applicant's application, concluded in para. 21 of her grounds of judgment that:

> [21] The Industrial Court has decided that from the evidence, the conduct of the applicant warranted the disciplinary action against her, as well as Mr. Chong over the scuffle. Having made a finding of guilt against the applicant over the misconduct, it is within the powers of the first respondent to demote her. The same cannot be said to be a claim for constructive dismissal as it cannot be said that the first respondent had acted in breach of a fundamental term of the contract of employment.

The Appeal

[11] The applicant's continued frustration brought her to the Court of Appeal. We heard her appeal on 22 November 2018 and we had unanimously allowed the appeal with costs of RM15,000 for here and below. We set aside the decision of the High Court dated 4 October 2017 and we also made an order for parties to go back to the second respondent for assessment of damages.

[12] Before arriving at our decision, we had considered the issues raised and submissions by parties before us. The applicant had submitted according to the charges preferred against her. Therefore, it is prudent to have the said charges laid down here, as follows:

> First Charge:
>
> That on 15 April 2008, at approximately 12pm to 1pm, in the afternoon, you Madam Kirba Daisy and another Mr Steven Chong Deng Hoe, being managers of the Company have conducted yourselves improperly, unruly and disrespectfully in the discharge of your duties, thus showing bad examples of managerial leadership to subordinates.
>
> Second Charge:
>
> That on 15 April 2008, at approximately 3pm, you have reported at the Ibu Pejabat Polis Daerah, Shah Alam of an incident between you and Steven Chong Deng Hoe that happened in the company premises, without exhausting internal remedy, thus bringing bad image to the good name of the company.
>
> Third Charge:
>
> That on 6 May 2008, you have caused to issue a legal letter by your lawyer's against Steven Chong Deng Hoe on an internal e-mail, which matter is being investigated by the company, thus causing unnecessary fear to your fellow manager, Mr Steven Chong Deng Hoe and total disregard to company's investigation process.

[13] It has to be noted that despite the action was taken against the applicant as stated in para. 4 above, the panel of the domestic inquiry found the applicant guilty only for the first and third charges.

[14] Therefore, before us, for the first charge, the applicant's complaint was that she had not acted in an unruly manner by being involved in the scuffle, that there was no scuffle and that instead she was being pushed by Mr Steven Chong while she was only doing her job, ie, the investigation on the pallets/boxes being sold to a third party without her knowledge and that of the management of the company.

[15] In respect of the third charge, the applicant submitted that the said charge was a baseless one. Mr Steven Chong had defamed her by alleging her as "trouble instigator and actress" *via* an email dated 16 April 2008. Despite that fact, the company did not take any action against him. Therefore, it was not wrong for the applicant to file suit against Mr Steven Chong when there was no action taken by the company despite her complaints.

[16] The first respondent, on the other hand contended that with the full knowledge of strained working relationship between the applicant and Mr Steven Chong, the applicant's action in doing investigation about the pallets at his back and refused to return the logbook when demanded could only serve to provoke Mr Steven Chong into losing his cool. The act also demonstrated malice on the part of the applicant as an attempt to get him into trouble especially when she lodged a police report against Mr Steven Chong. The first respondent also highlighted that the charges against the applicant were for conducting herself improperly, unruly and disrespectfully in discharging her duties, thus showing examples of bad managerial leadership to her subordinates. Not only the applicant who was subjected to domestic inquiry, but Mr Steven Chong also faced the same charges as well. In fact, while the applicant was found guilty for only the first and third charges, Mr Steven were found guilty of all charges he was charged with. Instead of dismissing both of them, the management decided to demote both of them which the first respondent has every right so to do. There was therefore no unreasonable conduct on the part of the first respondent that would amount to a fundamental breach of the implied term of mutual trust and confidence.

Our Deliberations And Findings

[17] We noted that the basis for the first respondent's action against the applicant in respect of the first and third charges had been premised upon its findings of fact, in particular in respect of the first charge. A lot depended on the finding by the first respondent as to what had happened on the corridor between the applicant and Mr Steven Chong. The first respondent had found that there was a scuffle between them. This finding was disputed by the applicant, who had contended all along that in fact no scuffle had occurred between them. The applicant continued with that contention before us.

[18] Until quite recently, the appeal court or review court could not disturb the findings of fact by the Industrial Court. But, in 2010, such religious adherence to that non-interference policy was abandoned by the apex court in the case of *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629. In departing from the long-held principle of giving due deference to the findings of fact made by the trial tribunal, the apex court has this to say:

> [18] The Court of Appeal has in a number of cases held that where finding of facts by the Industrial Court are based on the credibility of witnesses, those findings should not be reviewed (see *William Jacks & Co (M) Sdn Bhd*

v. Balasingam [1997] 3 CLJ 235, *National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam)* [2000] 1 CLJ 681, *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9, *Colgate Palmolive (M) Sdn Bhd v. Yap Kok Foong & Another Appeal* [2001] 3 CLJ 9. However, there are exceptions to this restrictive principle where:

(a) reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality, or

(b) there is no evidence to support the conclusion reached.

(see *Swedish Motor Assemblies Sdn Bhd v. Hj Md Ison Baba* [1998] 3 CLJ 288.)

[19] The contention of the applicant before us had required us to peruse through the evidence to look and see whether the learned chairman of the Industrial Court's finding on the matter of 'scuffle' in respect of the first charge, which was affirmed by the learned HCJ was indeed a correct one, in the circumstances.

[20] At this juncture, it must be recalled that the applicant's version as to what had happened along the corridor was that she was at all material times a victim of an assault by Mr Steven Chong. For this, we had to look at the relevant evidence and not simply believe the applicant's contention just because she had said so. Upon due perusal of the appeal record, in particular, the notes of proceedings before the Industrial Court, we noted the evidence of the CLW2, Sumathy a/p Gengadurai, who testified that she saw Mr Steven Chong chasing after the applicant and demanded that she returned the logbook that she had obtained from CLW2 who had earlier obtained it from Mr Rajan. It was her further testimony that Mr Steven Chong managed to snatch the book from the applicant's hands and that Mr Steven Chong also pushed her against the glass door along the corridor outside her room. We now reproduce that part of the evidence of CLW2, given in the course of her examination-in-chief, like so:

45. What happened you went into Miss Daisy office followed by Steven?

- Miss Daisy was coming out of her room with the book, then Steven reached her and angrily asked for the book.

46. When did this incident take place?

- Just outside her room.

47. What happened then?

- Mr Steven pushed her backwards and he wanted to pull away the book from her. He shouted "give me back the book and don't interfere in my operations and duties." He uttered the word crazy lady.

49. When Mr Steven pushed the Claimant did she fell?

- She almost felled but she leaned against the glass door.

50. Who started this commotion at this place?

- Mr Steven Chong.

[21] Further in her testimony, CLW2 was asked:

> Apart from pushing the Claimant, did Steven assault her?
>
> - He raised his hand like he wanted to beat her but he didn't.

[22] Those are the evidence of CLW2 in so far it relates to the incident involving the applicant and Mr Steven Chong at the corridor, given in her examination-in-chief, on the day in question, namely the 15 April 2008. (see pp. 103-104 it common core bundle ("CCB")).

[23] Naturally, the next question that needed to be asked must be this, "was this testimony challenged in material particular by the first respondent?" A perusal of the cross-examination of CLW2 had revealed that only two questions were raised that would tend to relate to that damning portion of CLW2's testimony in respect of Mr Steven Chong's conduct against the applicant. At p. 108 of CCB, the following appears:

> 41 ... The incident outside the Claimant's office. Top Box last paragraph. Is it here it happened?
>
> - Yes, I also saw Steven pulled away the book.
>
> 42 ... Did the Claimant say why acting like "samseng". I'll go make police report ...
>
> - Yes.

[24] Now, an objective appreciation of the above evidence that was elicited from the cross-examination of CLW2 would result in an irrefutable conclusion that the testimony of CLW2 must necessarily be that there was no 'scuffle' and that what had happened was that the applicant was assaulted by Mr Steven Chong who was bent on getting the log book away from the applicant, who had the right to have sight of its contents as it was connected with alleged improper sale to third parties, of pellets/boxes belonging to the first respondent . It could hardly have amounted to an effective challenge of Ms Sumathy's testimony on the extent of Mr Steven Chong's behaviour towards the applicant on the day in question. It was also admitted by the witnesses for the first respondent that the applicant would be responsible should there be misappropriation of such property belonging to the first respondent. This was borne out from the testimony of COW2, Mdm Lee Hwee Leng during her cross-examination, at p. 116 of the CCB, like so:

> 9. Do you agree that the Claimant is responsible if there is any misappropriation of the Company's properties in the Logistic Department?
>
> - Yes.

[25] In short, the applicant was discharging her obligations as senior official of the first respondent in protecting the latter's properties from being improperly pilfered, *albeit* by its own employees.

[26] This unchallenged testimony of CLW2, in our view, goes to the roots of the first charge against the applicant. A failure to cross-examine a witness of the adverse party, on a material factual circumstance must mean that such fact is accepted. (see *Wong Swee Chin v. PP* [1980] 1 LNS 138). But yet, the Industrial Court Chairman in para. 23 of his award found that there was a 'scuffle' that he said could be attributed to the hostile relationship between the applicant and Mr Steven Chong. He concluded at para. 23, by stating as follows:

> "Thus this Court agrees with the Company's submissions that the Company did not act unreasonably when it decided to discipline both the Claimant and Mr. Chong." It must be borne in mind that the First Charge had been concerned with a specific incident on the specified date as mentioned in the said charge. It had referred to a scuffle. That word would necessarily and ordinarily connote an altercation between two persons, involving an equally active participation by both persons involved. It is in this connection that the evidence of CLW2 assumed great significance. From such evidence, it was clear that it was a one-way traffic all the way. The applicant was pushed and she had almost fallen to the ground but for the intervention of the glass door that had broken the fall. Mr Steven Chong had raised his hand like wanting to beat her up but to his credit it must be said, he did not follow through. The fact that the applicant was the victim could not be ignored in the circumstances. Even if there was a hostile relationship between the applicant and Mr Steven Chong, that could not be a valid reason for Mr Chong to treat the applicant in the manner that he did. In fact, in labour law jurisprudence, an assault by a subordinate against his superior would invariably entail a summary dismissal from employment of the perpetrator.

[27] It was clear to us that the applicant was a victim of an assault by Mr Steven Chong, who was a subordinate of the applicant. There was no scuffle, and therefore, the applicant did not conduct herself in a manner that was unruly and disrespectfully thereby showing bad examples of managerial leadership to subordinates. Looking at para. 23 of his award, the learned chairman did not exhibit any reference to the evidence of CLW2 and how he had addressed the implication of the substantial rebuttal effect of her evidence on the element of 'scuffle' in the first charge. Clearly, his finding was made without taking into account relevant consideration, otherwise, against the weight of uncontroverted evidence, in particular of CLW2. On that ground, the first charge was not made out against the applicant by the first respondent.

[28] As regards the third charge, we could not agree with the finding of the Industrial Court Tribunal that had militated against the applicant. The circumstances surrounding this charge may be described as follows. From the evidence, it was not disputed that Mr Steven Chong had called the applicant as a "trouble instigator and actress". The applicant had taken umbrage at this and considered such remark as defamatory and a blemish against her character. In light of such circumstance, would it be unreasonable for a

person circumstanced as the applicant to take action against Mr Steven Chong, who in the estimation of the applicant had defamed her? It must be borne in mind that the first respondent did not take action on the complaint lodged by the applicant pertaining to allegations that Mr Steven Chong had made defamatory remarks against her. On top of that, the impugned email by the applicant was not copied to the first respondent. It was sent to Mr Steven Chong only for his notice of an impending legal action against him. The applicant was clearly exercising her private rights to vindicate a perceived wrong against her which the first respondent, to her mind, was not able to provide. Learned counsel for the first respondent did not show us evidence to the effect that the applicant was prohibited from enforcing her private rights while in the employment of the first respondent. Neither had it been shown in evidence that the applicant was mandatorily obliged to exhaust all internal remedies and mechanisms before she could launch a legal action in order to enforce any of her private rights by suing another individual although that person may be her fellow co-worker in the employment of the first respondent. Indeed, it was rather telling to us that COW2 did not give any answer when she was cross-examined on this matter as could be seen at pp. 121 to 122 of CCB, in relation to questions nos. 26 and 27. The applicant had taken legal action against Mr Steven Chong in his personal capacity. On top of it all, the first respondent was never cited or named as a party in the legal notice. We could not see how the first respondent could mount the third charge against the applicant given the factual matrix of this case.

[29] In that regard, we reproduce the notes of evidence in relation to the third charge emanating as it were, from COW3, Tan Ah Bah (David Tan). He was the husband of COW2 and together they were the majority shareholders of the first respondent.

> 65. The 3rd charge of sending legal notice is her personal opportunity [*sic*] is a personal matter and the company is not involved. She should not be found guilty based on Chris Tan letter this is a personal matter and the Company should not be involved?
>
> - Yes, agree.
>
> 66. When you demote her to a lower position it is a breach of the contract of employment, therefore she has the right to claim for constructive dismissal?
>
> - Yes.

[30] We noted that there was no re-examination by the first respondent on these issues as raised in the questions posed and amplified by us in the immediate paragraph above.

[31] Again, there were no reference to these evidence by the learned chairman, which on the face of it would appear to favour the applicant in coming to his award. Again, there was a failure to take into account relevant consideration in deciding the case before him in relation to the third charge against the applicant.

[32] We noted as well, that the learned HCJ had expressed her reservation in her grounds of judgment, about disturbing the findings of fact made by the second respondent. True, an award of the Industrial Court is *ipso facto* deserving of deference, but that having been said, it is not a rule cast in stone. Only in deserving cases would an award be immune from interference by the HCJ during judicial review. As alluded to above, the law had since evolved and now an award may be interfered with in terms of finding of fact, if the circumstances before the review or appeal court are such that interference is warranted, so as to right an obvious wrong that had occasioned an injustice to an aggrieved party to the adjudication. We reiterate the words of learned Justice Raus Sharif FCJ (as he then was) in the *Ranjit Kaur* case (*supra*) having cited long-established cases, such as *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 thus:

> [19] It is clear from the above authorities that the scope and ambit of *Rama Chandran* had been clearly explained and clarified. Decided cases cited above have also clearly established that where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amendable to judicial review.
>
> [20] That was what had exactly happened in this case. The Industrial Court whilst recognising that there was no positive proof of victimisation nevertheless went on to conclude that there was victimisation. The learned chairman of the Industrial Court held:
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> > The manner in which the charges have been framed against the Claimant gives the impression that the Claimant has been victimised. This Court of course cannot uphold a plea of victimisation in the absence of positive proof but as a Court of social justice it is bound to give due consideration to the possibility of victimisation and should any doubt arise it should give the benefit of the doubt to the employee after taking into consideration of the whole of evidence and the particular circumstances surrounding the case.
>
> [21] The High Court as well as the Court of Appeal found that there was no evidence to support the issue of victimisation. Justice Low Hop Bing, JCA held that the 'Industrial Court had gone on a frolic of its own' in finding that the appellant had been victimised. He further held that it was manifestly wrong for the Industrial Court to proceed to embark on 'the

> possibility of victimisation' when it should have been concerned with probabilities i.e., on the balance of probabilities. We agree with Justice Low Hop Bing JCA. Clearly the Industrial Court has committed jurisdictional errors when finding the possibility of victimisation in the absence of positive proof and misdirecting on the standard of proof by reference to possibility instead of a balance of probabilities.

[33] In the context of the factual circumstances obtaining in this appeal, we were of the respectful view that the courts below were wrong in finding that there was a scuffle between the applicant and Mr Steven Chong, the crucial gravamen in the first charge. Such finding was against the weight of evidence adduced before the second respondent, or otherwise not supported by the revealed facts. The unjustified finding that there was a scuffle had led the second respondent to conclude that both parties were at fault and thereby handing an award that it did, which was later affirmed by the learned HCJ at the judicial review application hearing. Surely, the finding of the second respondent was not deserving of deference by the learned HCJ. In fact, such a finding was one susceptible to a review and ought to be disturbed. We would apply the above-quoted words of the apex court's Justices in the *Ranjit Kaur* case (*supra*) *mutatis mutandis*. We found that the first charge was not proven against the applicant on the balance of probabilities.

[34] As regards the third charge, we were also of the considered view that the first respondent had failed to establish the case against the applicant. As could be seen, there was no valid reason for the third charge to be framed against the applicant. What the applicant did by sending the legal notice to Mr Steven Chong *via* email was a valid exercise of her private right against Mr Steven Chong and had nothing to do with the first respondent. How such a valid exercise of personal right by the applicant had caused unnecessary fear to her fellow manager, Mr Steven Chong and had amounted to a total disregard to company's investigation process, to our minds, could be utilised to found a charge such as the third charge against the applicant was mystifying to say the least. Obviously, the third charge had stood on tenuous ground. We were in agreement learned counsel for the applicant that the third charge against his client had no proverbial legs to stand on.

[35] Now, the statement of the law on constructive dismissal in Malaysia can be found in the Supreme Court decision of *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 where Salleh Abas LP had occasion to state the following:

> The common law has always recognised the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer.

[36] Of course the English position was reiterated with typical clarity, ten years prior, by Lord Denning MR in the case of *Western Excavating (ECC) Ltd v. Sharp* [1978] 2 WLR 344, where an employee was justified to walk away from his employment when his employer had evinced the intention not to be bound by the contract of employment. In this case, the applicant had given notice to the first respondent to the effect that if she was not reinstated to her former position, she would deem herself as having been constructively dismissed. Upon expiry of the period given to reinstate and there being no reinstatement by the first respondent, the applicant walked away from her workplace. There was no evidence of the applicant evincing any intention to affirm the contract of employment between her and the first respondent. She had done all that needed to be done before leaving the first respondent, including the notice of her intention of leaving if she was not reinstated to her former position in the first respondent. As Lord Denning MR had said in the *Western Excavating* case (*supra*) the employee 'must make up his mind soon after the conduct of which he complains, for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract'. We found no delay on the part of the applicant in leaving the first respondent.

[37] It is trite law that an award of the Industrial Court is susceptible to be set aside if it is unreasonable within the meaning in the decision in the celebrated case of *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223, otherwise commonly referred to as the *Wednesbury*'s unreasonableness test. It is also susceptible to be quashed if it is one which is perverse. It is a perverse award if it falls within the embrace of illegality, irrationality, and procedural impropriety as propounded and understood *vide* the speech of Lord Diplock in the *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 ("the *CCSU* case"). In fact, Lord Diplock had added to the list another ground to quash an award, namely proportionality. A common thread, we noted, that had run through a perverse decision under any of the heads listed in the *CCSU* case (*supra*), has been the element of it being contrary to the accepted or expected standard or practice.

[38] In light of the fact that the first charge and the third charge were not established, there was no reason whatsoever for the first respondent to demote the applicant from her position. Without those adverse findings against the applicant, there existed no justification for the first respondent to impose the demotion against the applicant. Even COW3 agreed that the applicant should not have been demoted. The applicant was justified in treating herself as having been constructively dismissed by the first respondent, in the circumstances. In our considered view, this award by the second respondent had qualified as a perverse decision and it cannot be allowed to stand and must therefore be quashed.

[39] With respect, we were constrained to rule that there were merits in the applicant's appeal.

Our Conclusion

[40] Premised on the above, we had allowed this appeal with costs. We set aside the decision of the HCJ and that of second respondent, the Industrial Court. An order of *certiorari* was therefore issued to quash the award of the second respondent. We had also ordered that the case be remitted back to the second respondent for damages payable to the applicant for wrongful dismissal by the first respondent, for assessment. In the circumstances of this case, we agreed with learned counsel for the applicant that reinstatement was not the appropriate remedy as there was already a loss of mutual trust between the litigating parties. As to costs, we ordered the first respondent to pay RM15,000 for here and below, subject to payment of allocator fees. Deposit, if any was paid, was ordered to be refunded to the applicant, being the appellant in this appeal.